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No. 244

In The
Supreme Court of the United States
OCTOBER TERM, 1950

AMERICAN FIDELITY & CASUALTY COMPANY, INC.
a corporation,
Petitioner,

VERSUS

ALL AMERICAN BUS LINES, INC., and SECURITY MUTUAL CASUALTY COMPANY, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AUGUST, 1951.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to reverse the Judgment of the United States Court of Appeals for the Tenth Circuit entered on the 13th day of July, 1951.

OPINIONS BELOW

There have been two appeals to the Circuit Court of Appeals. Herein pages to first record on appeal will be referred to as (1-R) and pages of the second record as (2-R). The trial court entered judgment in favor of the respondent All American Bus Company, Inc., on December 3, 1948 (1-R 28-29) which is unreported. The United States Court of Appeals for the Tenth Circuit reversed such judgment, 179 F. 2d 7. On September 13, 1950, pursuant to the Mandate of the Circuit Court the trial court dismissed the cause as to the respondent All American Bus Lines, Inc., and directed a substitution of the respondent Security Mutual Casualty Company as party plaintiff (2-R. 5-6). On September 30, 1950, the trial court entered judgment in favor of the respondent Security Mutual Casualty Company (2-R. 30-31), which is unreported. The Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court (2-R. 41-47), which judgment is part of the printed record but has not yet been officially reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 23, 1951 (2-R 47). A Petition for Rehearing filed on July 9, 1951 was denied on July 13, 1951 (2-R 49). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

SPECIFICATIONS OF ERROR AND QUESTIONS PRESENTED

SPECIFICATION I

This litigation presents a question of vital public importance not only to the litigants involved but to all casualty insurance companies and to every person who purchases casualty insurance.

SPECIFICATION II

The litigation involves a legal question of first impression, thereby making desirable an early and definitive ruling by the Supreme Court.

SPECIFICATION III

A conflict exists between the decisions of five Circuits, to-wit: (Tenth) this case, also American Fidelity & Casualty Co. v. G. A. Nichols Co., 173 F. 2d 830; (Seventh) Royal Transit v. Central Surety & Ins. Corporation, 168 F. 2d 345; (Sixth) Noshey v. American Automobile Insurance Co., 68 F. 2d 808; (Fifth) American Mutual Liability Insurance Co. v. Cooper, 61 F. 2d 446; (Fourth) American Casualty Company of Reading, Pa. v. Howard, 187 F. 2d 322. The Supreme Court of the United States has not passed upon the legal questions involved herein.

SPECIFICATION IV

Petitioner's constitutional right to a jury trial was denied by the trial court.

STATEMENT OF THE CASE

Petitioner, American Fidelity & Casualty Co., Inc. (hereinafter referred to as "American"), is a *primary* insurance company. Respondent, Security Mutual Casualty Co. (hereinafter referred to as "Security"), is an *excess* insurance company. Respondent, All American Bus Lines, Inc. (hereinafter referred to as "Bus Company"), is a motor passenger carrier. American and Security both wrote policies of insurance, insuring the operations of the Bus Company. American's policy was for $10,000 primary coverage (1-R 5-8). Security's policy was for an additional $90,000 excess coverage (1-R 115-116) also (2-R 20-29). An accident occurred as a result of the operation of a bus by the Bus Company. The claim presented was of a sufficient amount as to involve the insurance coverage of both the American and Security (1-R 121-125). An opportunity was presented to settle the claim for an amount within the policy coverage of American, which the American declined to do (1-R. 64). The jury returned a verdict for more than American's coverage (1-R. 114). In settlement of the judgment American paid $10,000 and Security paid $7,500 (1-R. 113-114). It is admitted that the Bus Company paid premiums to both American and Security for the insurance coverage represented in their respective policies (1-R. 88).

The Bus Company sued American contending that it was guilty of "bad faith" and "negligence" in refusing

to settle the loss for an amount within its policy coverage (1-R. 1-18). The Circuit Court held that as the Bus Company had sustained no loss it was not the proper party in interest to prosecute the action (2-R. 43) 179 F. 2d 7. Security was substituted as a party plaintiff in the trial court (2-R. 6). Security contends that under the subrogation clause of its policy it is entitled to step into the shoes of the Bus Company, charge American with bad faith in refusing to settle the claim within its policy coverage and recoup its loss from American (2-R. 3-4).

In defense American contends that Security not being a party to the policy contract, is not entitled to sue American for its alleged breach of contract in declining to settle the loss. American contends further that it was not guilty of bad faith or negligence in declining to settle the claim (2-R. 7-29). The trial court entered judgment in favor of Security and against American, which judgment was affirmed by the Court of Appeals for the Tenth Circuit (2-R. 47), not yet officially reported, which is the judgment involved in the present proceedings.

REASONS FOR ALLOWANCE OF WRIT

The insurance business is a nation wide industry. Policies written in one State "concern people living far beyond the boundaries" of the State in which the policy is written. Mr. Justice Black, in the case of *U. S.* v. *Southeastern Underwriters Association*, 322 U.S. 533,

540, 88 L. ed. 1440, 64 S. Ct. 1162, very aptly comments:

> "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or business of almost every person in the United States."

The instant case is of vital concern, not only to the parties litigant but to all casualty insurance companies in the United States and every purchaser of a casualty insurance policy.

The instant case involves an interpretation of the "defense clause" of a standard public liability insurance policy. Under this provision an insurance company is required to "defend" in the name of the policyholder and on his behalf "any suit against the insured * * * seeking damages, etc."

There is considerable lack of uniformity among the courts of the various circuits in defining the duties owed by an insurance company to the policyholder under the defense clause of its standard policy. The instant case holds that the relationship between the policyholder and the insurance company is a fiduciary relationship and that the insurance company in considering the advisability of making a settlement for an amount within the policy coverage must act in "good faith" towards the policyholder.

The vital point which distinguishes the instant case from all other cases and causes the case to be of public concern is the salient fact that there is involved herein not a controversy between the policyholder and insurance company but a controversy between an excess insurance company and a primary insurance company.

In this case the policyholder, the Bus Cmpany, sustained no loss. The Bus Company bought and paid for full insurance protection both for himself and the traveling public. In paying the loss, the primary insurance company, American, paid the maximum amount it owed under its policy, or $10,000. The excess insurance company, Security, paid $7,500. Each insurance company had collected premiums from the Bus Company for the insurance coverage afforded. Each insurance company owed the policyholder the duty of furnishing a good faith defense. After the Security paid what it was required to pay under its excess policy, it now seeks to be unjustly enriched and recoup its loss for which it was paid a premium by suing the primary insurance company, American, which paid out the maximum limits of its policy. The Security is not satisfied with collecting a premium for the loss it sustained. It wants to collect the premium, retain it and not pay the loss. The question therefore becomes of vital importance, not only to the litigants involved but to all insurance companies writing public liability coverage.

At present there are approximately three hundred and eighty-seven insurance companies in the United States engaged in the business of writing casualty insurance (Spectator Handy Chart, 1951). A considerable number of these companies write public liability insurance covering motor vehicles for policyholders who also carry excess insurance policies. The decision in the instant case vitally affects the business of each casualty insurance company writing this type of coverage.

This is a case of first impression for any court. A new course is being charted which will guide the insurance world in the future conduct of its business. May the course be true. The writer has searched diligently for a precedent but has been unrewarded. He is reminded of the words of the great advocate Rufus Choate, who was asked for a precedent when arguing a case before this distinguished body. He replied: "I will look, Your Honor, for a precedent, although it would be a pity that this court should lose the honor of being the first to establish so just a rule."

There are several cases in the recorded reports, which will be hereinafter discussed, denying the right of one insurance company to seek contribution from a second insurance company for a loss the first company was required to pay under its policy and for which it had been paid a premium.

The foundation for the present lawsuit brought by the excess insurance company is unsound. It is built on sand and not on rock. The excess company was not a party to the insurance contract entered into between the primary insurance company and the policyholder. Under the terms of its policy the primary inusrance company obligated itself to properly defend the policyholder. This was a personal duty it owed the policyholder. For this obligation the primary insurance company received due compensation in the nature of a policy premium. It owed no duty to the excess insurance company, contractual or otherwise. It collected no premium or compensation for paying a loss sustained by the excess insurance company. There was no privity of contract between the primary insurance company and the excess insurance company. The excess insurance company likewise contracted to perform certain obligations for the policyholder. It contracted to pay all losses occasioned by reason of the Bus Company's operation when the amount of the loss was in excess of the $10,000 primary coverage furnished by the primary carrier. For the performance of this duty the excess company collected a premium. The excess insurance company should not be permitted to "have its cake and eat it too." Common decency requires that the excess insurance company be compelled to pay its own debts and not welch about the matter. It is axiomatic that one individual shall not be unjustly enriched at the expense of another.

If the decision of the Circuit Court is permitted to stand, then an excess insurance company need never pay a loss. Their business should be prosperous. In the case of excess insurance there is always primary insurance. Let us visualize the situation which would arise if the present decision is permitted to stand. A claim arises which involves more than the coverage of the primary carrier. An offer of settlement is received within the coverage of the primary carrier. The primary carrier in good faith declines to accept the offer of settlement. The policyholder makes no complaint for he has quite properly provided himself with adequate insurance coverage. The judgment on the claim is of sufficient size as to require the excess company to pay a portion of the judgment. It does so, but then sues the primary carrier for the purpose of recouping its loss. Is that fair? Is this equity? Or is this unjust enrichment by one at the expense of another? Such an interpretation emasculates the provisions of insurance contracts. The present decision is being carefully watched by the insurance world. It concerns the insurance business generally and also the cost of insurance to the purchasing public. The instant case presents a siutation wherein a grave injustice has been done which justifies the issuance of the writ.

> "There is no room for the application of the subrogation clause between the insurers."
>
> *Keener* v. *Indemnity Co.*, 320 Mass. 6, 67 N.E. 769.

"The right of subrogation does not obtain in favor of one discharging debt in performance of his own obligation."

Amick v. *Columbia Casualty Co.* (C.C.A. 8), 101 F. 2d 984;
American Surety Co. of New York v. *Bank of California* (D.C., Ore.), 44 F. Supp. 81;
William Burford & Co. v. *Glasgow Water Co.*, 223 Ky. 54, 2 S.W. 2d 1027.

The doctrine of subrogation invests an insurance company with certain rights but "not with the right to override its own obligation to the assured."

Great Lakes T. Corporation v. *Interstate S.S. Co.*, 301 U.S. 646, 57 S. Ct. 915, 81 L. ed. 1318.

"One who engages in the business of insurance for compensation may properly be held more rigidly to his own obligation."

Chapman v. *Hogue*, 296 U.S 526, 56 S. Ct. 333, 80 L. ed. 370.

"This right (the right of subrogation) does not entitle an insurance company which has paid the loss to be subrogated to insured's claim against another insurer."

C.J.S., Vol. 46, pp. 177, 178, Par. 1211.

No privity of contract exists between several insurance companies paying their proportionate part of a loss, and no right of contribution or subrogation exists between them.

Continental Casualty Co. v. *Curtis Publishing Co.* (C.C.A. 3), 94 F. 2d 710;

Southern Surety Co. v. *Commercial Casualty Insurance Co.* (C.C.A. 3), 31 F. 2d 817;
American Casualty Co. v. *Maryland Casualty Co.* (D.C., Pa.), 20 F. Supp. 561;
Fidelity & Casualty Co. of New York v. *Firemen's Fund Indemnity Co.*, 38 Cal. App. 2d 1, 100 P. 2d 364.

An insurance company is not entitled to charge another insurance company with bad faith for its refusal to settle a claim within its policy coverage.

Traders & General Insurance Co. v. *Hicks Rubber Co.*, 140 Tex. 586, 169 S.W. 2d 142.

The legal question presented herein is of vital importance to the insurance buying public, for after all the purchaser in the final analysis pays the bill. Any judicial decision which broadens the provisions of an insurance contract has a corresponding effect on the cost of the insurance to the purchaser. Sometimes it is necessary to broaden the provisions of a policy in order to furnish complete protection for the policyholder, but when the exposure of the insurance company is increased it logically follows that the premium must be larger. Candidly but sincerely I say that if primary carriers are required to assume the obligation of excess insurance companies, then their exposure is increased and they are entitled to more premium. In the instant case the Bus Company paid the primary insurance company a certain premium for per-

forming its policy obligations to the Bus Company. The Bus Company also paid the excess carrier for the coverage afforded by its policy. Insurance rates and premiums are based entirely on the hazard and risk incurred and the amount of insurance coverage. If the decision of the Circuit Court becomes final it is logical to assume that casualty insurance will cost the purchasing public many thousands of dollars more during the next several years. This is entirely unnecessary. Each company should pay its own debts and reduce the cost to the public to a minimum. The public is vitally concerned with the effect of the present decision.

There is some conflict in the principles of law enunciated by the various Circuits. As the insurance business is a nationwide industry, uniformity in the interpretation of policy provisions becomes important. This is particularly true in the case of policies covering motor vehicles. Motor vehicles travel throughout the nation. In this particular instance the bus lines of the Bus Company traversed some ten or twelve States. Litigation involving the interpretation of policy contracts frequently reaches the Federal courts because of a diversity of citizenship of the parties. Policy provisions are practically uniform. Uniformity in interpretation is essential to avoid confusion. The obligation of an insurance company to a policyholder under the defense clause of its policy should be the same in every jurisdiction. A policyholder starts

out on an automobile trip. He is entitled to the security of knowing that he has the same defense under his policy in every State he enters. The Supreme Court of the United States has not passed upon the questions involved in the present litigation. There is a lack of harmony among the decisions of the various circuits. Under Specification III the decisions of five circuits are listed. The most recent case cited is the case of *American Casualty Co. of Reading, Pa.* v. *Howard,* 187 F. 2d 322, wherein the Fourth Circuit held that in determining the advisability of settling a claim within the policy coverage an insurance lawyer was not required to be a prophet but must act reasonably and in good faith. The decision of the Fourth Circuit appears to be in conflict with the present case decided by the Tenth Circuit; also the case of *American Fidelity & Casualty Co. G. A. Nic*l*ls* (C.C.A. 10), 173 F. 2d 830, wherein the Tenth Circuit held the relationship between the insurance company and the policyholder to be in the nature of a fiduciary relationship requiring the exercise of the utmost good faith on the part of the representatives of the insurance company.

The Circuits are in decided conflict over the definition to be applied to the words "good faith." In order to avoid confusion an early definitive ruling of the Supreme Court of the United States for the guidance of the Federal courts is advisable. This being a case of first impression, an opportunity is presented to clarify the conflicting theories presented in the decisions of the various Circuits.

The decision of the Circuit Court in the instance case is erroneous on the question of the good faith required of an insurance company in declining to settle a claim within its policy coverage. American, the primary carrier, owed no duty to Security, the excess insurance company, to settle the claim in question for any amount. In fact the primary insurance company, American, did not know of the existence of the excess insurance policy (1-R. 56-91). The Bus Company made no demand upon the primary insurance company to settle the claim (1-R. 88-89). The Bus Company's manager appeared at the trial of the case but did not seem to be worried and left the courthouse before the jury returned its verdict (1-R. 55). The excess insurance company did not seem to be concerned and made no demand upon the primary insurance company to settle the claim (1-R. 88, 89, 91). I cannot be charged with bad faith if no one is criticizing my actions. How can an individual or a company be charged with bad faith in pursuing a certain course of conduct if no one is criticizing the course of conduct pursued? Good faith or bad faith have been defined as a "state of mind." *Johnson* v. *Hardware Mutual Casualty Co.*, 109 Vt. 481, 1 A. 2d 817. Bad faith connotes the idea of something reckless or malicious being done. Mistakes of judgment do not constitute bad faith.

American Casualty Company of Reading, Pa. v. *Howard* (C.C.A. 10), 187 F. 2d 322;
Noshey v. *American Automobile Insurance Co.* (C.C.A. 6), 68 F. 2d 808.

"The gift of prophecy has never been bestowed upon ordinary mortals."

Burham v. *Commercial Casualty Co.*, 10 Wash. 2d 624, 117 P. 2d 644.

"Hindsight sometimes turns out better than foresight."

Wynnewood Lumber Co. v. *Travelers Insurance Co.*, 173 N.C. 269, 91 S.E. 946.

Some years ago a distinguished statesman was asked to write a few words in the memory book of a high school senior. He penned the words "Be genuine." Be genuine and honest and that is all that is necessary. This case presents a situation wherein an injustice has been done justifying the issuance of the writ.

Under Specification IV petitioner presents the error of the trial court in refusing to grant the petitioner a jury trial. This presents an unusual situation. The right to a jury trial is guaranteed by the Constitution of the United States. Amendment Seven and Amendment Fourteen to the Constitution of the United States, U.S.C., Vol. 3, Page 379, Vol. 4, Page 2.

The instant case was originally filed by the respondent, Bus Company (1-R. 1-18). A judgment was en-

tered in favor of the Bus Company (1-R. 28-29). The Circuit Court reversed such judgment holding that as the Bus Company had sustained no loss it was not the proper party in interest. *American Fidelity & Casualty Co.* v. *All American Bus Lines* (C.C.A. 10), 179 F. 2d 7. After the case was remanded to the trial court the excess insurance company filed an application to be substituted as party plaintiff (2-R. 1-2). Petitioner, American, objected to such substitution, contending that the excess insurance company, Security, was not one of the parties designated in Rule 25 of the Federal Rules of Civil Procedure governing the right of substitution. Petitioner's objections were overruled and the substitution permitted (2-R. 6). Within a period of ten days under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure the petitioner, American, filed a responsive pleading to the complaint as amended by the substitution of the excess insurance company, Security, as party plaintiff (2-R. 7-29). On the same date, under Rule 38 of the Federal Rules of Civil Procedure, the petitioner, American, filed its written demand for jury trial (2-R. 29-30). The trial court denied the demand of the petitioner for a jury trial, granted no additional hearing of the case and summarily entered judgment in favor of the excess insurance company, Security (2-R. 30-31). In doing so the trial court erroneously construed the provisions of Rules 15(a), 25 and 38 of the Federal Rules of Civil

Procedure. Petitioner's constitutional right to a jury trial was denied. The decision of the Circuit Court affirms the ruling of the trial court. For this additional reason the Writ should issue.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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